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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. 83-6016

LARON WILLIAMS,

Petitioner,

V.

STATE OF TENNESSEE,

Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE

SUPREME COURT OF TENNESSEE

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the trial court erred in denying the petitioner's motion for funds to secure the assistance of an expert in the field of hair analysis.

II. Whether the trial court properly monitored the admission of evidence and the arguments of counsel at the punishment phase of the trial.

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The respondent respectfully submits that the petition for writ of certiorari filed in this cause should be denied.

OPINIONS BELOW

On April 23, 1982, the trial court denied the petitioner's motion for a new trial. The judgment of the trial court was affirmed by the Supreme Court of Tennessee on August 29, 1983. That opinion is officially reported at 657 S.W.2d 405.

The petitioner filed a petition to rehear with the Supreme Court of Tennessee on September 8, 1983. The petitioner's petition to rehear was summarily denied on October 3, 1983.

JURISDICTION

The petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. § 1257(3). However, the respondent submits that this record does not present a substantial federal question.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Sixth Amendment, United States Constitution:

> In all criminal prosections, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

The Eighth Amendment, United States Constitution:

> . . . (N)or cruel and unusual punishments inflicted.

The Fourteenth Amendment, United States Constitution:

> . . . No state shall . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Tenn. Code Ann. § 39-2-202:

> (a) Every murder perpetrated by means of poison, lying in wait, or by other kind of willful, deliberate, malicious, and premeditated killing . . . is murder in the first degree.
>
> (b) A person convicted of murder in the first degree shall be punished by death or by imprisonment for life.

Tenn. Code Ann. § 39-2-203:

> (a) Upon a trial for murder in the first degree, should the jury find the defendant guilty of murder in the first degree, they shall not fix punishment as a part of their verdict, but the jury shall fix the punishment in a separate sentencing hearing to determine whether the defendant shall be sentenced to death or life imprisonment. The separate sentencing hearing shall be conducted as soon as practicable before the same jury that determined guilt . . .
>
> (c) In the sentencing procedure, evidence may be presented as to any matter that the court deems relevant to punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances . . .; and any evidence tending to establish or rebut any mitigating factors . . .
>
> (g) If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proved by the state beyond a reasonable doubt, and said circumstances are not outweighed by any mitigating circumstances, the sentence shall be death . . .

(i) No death penalty shall be imposed but upon a unanimous finding, as heretofore indicated, of one or more of the statutory aggravating circumstances, which shall be limited to the following . . . :

(2) The defendant was previously convicted of one or more felonies, other than the present charge, which involved the use or threat of violence to the person;

(7) The murder was committed while the defendant was engaged in committing . . . any . . . burglary . . .

STATEMENT OF THE CASE[1]

In its May term of 1981, the Madison County Grand Jury indicted the petitioner on charges of first degree burglary, first degree murder, and employing a firearm during the commission of a felony. (I, 3-4).

On November 10, 1981, the respondent filed a petition to strike the petitioner's motion for the appointment of an independent expert in the field of hair analysis. (II, 12-16). On November 27, 1981, the petitioner filed a motion for funds to secure the assistance of an expert in the field of hair analysis. (II, 17-19). The respondent filed a petition to strike the petitioner's motion for funds on December 1, 1981. (II, 20-22). The trial court denied the petitioner's motion for funds on December 3, 1981, with leave to renew the motion should the petitioner locate an expert without delaying the trial. (III, 12-13).

On December 8, 1981, the petitioner filed a motion *in limine* to prohibit the admission into evidence of the testimony of FBI Agent Michael Malone concerning the results of hair analysis performed by him. (II, 23-24).

A trial was had in this cause on December 8 through December 14, 1981. The jury returned a verdict finding the petitioner guilty of first degree burglary; punishment was assessed at not less than ten (10) years, nor more than fifteen (15) years incarceration in the state penitentiary. The jury also found the petitioner

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[1] References to the record will be indicated by volume and page number. Volume I consists of pleadings; Volume II consists of the supplemental pleadings; Volume III consists of the pre-trial motion hearing; Volumes IV-VIII consits of the proof adduced at trial; and Volume IX consists partially of the proof adduced at trial and partially of the proof adduced at the sentencing hearing.

guilty of first degree murder; punishment was assessed at death by electrocution. (I, 24-25).

On January 11, 1982, the petitioner filed a motion for a new trial. (I, 26-29). The respondent filed a response to the petitioner's motion for a new trial on January 18, 1982. (I, 30-31). The trial court overruled the petitioner's motion for a new trial on April 23, 1982; an execution date of July 14, 1982, was set. (I, 32-33).

On April 20, 1982, the petitioner filed a notice of appeal. (I, 34-35). On May 28, 1982, the Honorable William J. Harbison, Chief Justice of the Tennessee Supreme Court, granted the petitioner's motion for a stay of execution pending further orders of the Court. (I, 39). Following the issuance of the opinion of the Tennessee Supreme Court, the Honorable Frank F. Drowota, III, Justice of the Tennessee Supreme Court, granted the petitioner's motion for a stay of execution pending further orders of the Court.

The petitioner timely filed the instant petition for a writ of certiorari with this Court.

STATEMENT OF THE FACTS

I. THE GUILT PHASE OF THE TRIAL

A. The Respondent's Proof

Louise Hawkins, an acquaintance of the petitioner, testified that she saw the petitioner on May 12, 1981, in Memphis. The two engaged in some sort of argument, with the petitioner hitting her in the mouth. After hitting Hawkins, the petitioner told her that he wanted her to take him to Jackson. (IV, 55-57). Hawkins, her niece, and the petitioner left Memphis around 8:00 p.m., arriving in Jackson some two hours later. (IV, 57).

Upon arriving in Jackson, Hawkins drove the petitioner to the Regency Inn at the petitioner's request. (IV, 58). With money provided by the petitioner, Hawkins rented Room 24 for a period of one week. Hawkins listed her Memphis address and her sister's automobile license number on the motel registration card. (IV, 58-60). While Hawkins was registering for the petitioner, the petitioner remained outside in the car. (IV, 58-59).

Hawkins obtained the room key and gave it to the petitioner. She then accompanied the petitioner, who was carrying a large grocery bag, into Room 24. After staying approximately 30 minutes, Hawkins and her niece returned to Memphis. (IV, 62).

Sgt. L. B. Gooch of the Memphis Police Department testified that he was responsible for recording the serial numbers of weapons belonging to the Memphis Police Department at the time of the instant crime. (IV, 65). Sgt. Gooch identified State's Exhibit No. 3, a .38 caliber Smith & Wesson revolver, serial number K516136, as having the same serial number as that of a police revolver belonging to the Memphis Police Department. (IV, 71-73).

Gooch further testified that for a period of time after May 17, 1981, the revolver was completely out of the possession of the Memphis Police Department and that he personally did not know where the gun was while it was missing. (IV, 73-74).

Robert Duffey, a voluntary bookkeeper for St. Mary's Parish in Jackson, Tennessee, testified that the victim, Father John Jay Jackson, was to have conducted a mass at 8:10 a.m. on the morning of May 15, 1981. When the priest had not appeared by 8:20 a.m., Duffey unlocked the back door to St. Mary's Rectory with his key and went inside. (IV, 76-77). He discovered the dead Father Jackson lying on the floor of the den four feet inside the door. (IV, 77-78). Duffey noticed that the priest had blood on his neck, his pockets had been pulled out, and the den was in a state of disarray. (IV, 78-79).

Duffey ran outside the rectory and notified the principal, Sister Catherine DeRicci, of his discovery. He then telephoned the police, using the "911" emergency number. Prior to the arrival of the police, Duffey, Sister DeRicci, and Mrs. Dale Smith turned the priest's body over so that it was lying on its back. (IV, 79-81). Duffey directed the police, who arrived on the scene very quickly, to the den and was present at the time the police sealed off the room. (IV, 79).

Captain Barney E. Crews, Jr., a captain with the Jackson Police Department, responded to a call at St. Mary's Parish on the morning of May 15, 1981. In the course of his duties, he took various photographs of the rectory and St. Mary's Manor, a high rise apartment complex which is located next to the church. (IV, 83). A week later, he shot aerial photographs and slides from a Tennessee Highway Patrol helicopter. (IV, 83).

During his investigation, Crews observed that someone had gained entry to the rectory by breaking out one of the sliding glass doors which opened onto a screened-in porch. (IV, 85-86). He also observed footprints in the ground on the southwest corner of the building. (IV, 86). Crews followed the footprints across a ditch to a dumpster located at the northwest corner of St. Mary's Manor and found footprints surrounding the dumpster. (IV, 86-87). Crews also discovered tracks leading from the dumpster, going across the interstate, and going up to Highway 45 Bypass to Watkins Tower (presently known as Commerce Tower). (IV, 87-88).

On cross-examination, Crews testified that the footprints which were found on the carport were photographed. The police also took an impression of the oil-stained footprint, which was a complete print, located on the carport. (IV, 89-90). Plaster casts were made of the footprints discovered at the corner of the rectory, at the dumpster, leading to St. Mary's Manor, and around the curve of the Manor. (IV, 90-91). In Crews' opinion, these footprints were the same. (IV, 91-92).

On re-direct examination, Crews testified that the tread of the shoes which made the oil-stained footprint on the carport matched the tread on the plaster casts. (IV, 93). However, one set of prints lifted from the carport was different from the prints captured on the plaster casts. (IV, 94).

John R. Formacka, an officer with the Jackson Police Department, was dispatched at 8:26 a.m. on May 15, 1981, to St. Mary's Rectory. After being directed to the den of the rectory, Formacka found the priest's body lying on its back. Based upon his observation of the body, Formacka testified that the victim, who

had a wound above his right temple, had obviously been deceased for some time. (IV, 98-99). Formacka immediately secured the crime scene and contacted the Criminal Investigation Division [hereinafter referred to as CID], who arrived within four minutes. (IV, 99).

As a result of information provided to the police department by Ed Bendowski, Formacka returned to the scene the following morning. In the parking lot of Watkins Tower, which is located across Highway 45 Bypass from St. Mary's, Formacka discovered a cardboard box. (IV, 100-01). Noticing footprints in the area which were similar to those found on the grounds of St. Mary's, Formacka did not pick up the box, but rather notified other officers who arrived on the scene and photographed the box. (IV, 102). A penny, a nickel and a small, round piece of cardboard were discovered inside the box. Although there was nothing to indicate that the coins came from the same source, Formacka testified that he noticed coins scattered on the floor of the hallway and the den of the rectory. (IV, 104-05).

On cross-examination, Formacka stated that children apparently play in the area surrounding the rectory and that he did not know whether the footprints which were discovered in the area had been made by children prior to the time the police arrived on the scene. (IV, 107-08). Formacka further testified that he observed a flower pot lying on the top of a coffee table in the den of the rectory; the flower pot had been turned on its side and the coffee table was at an angle. (IV, 105-07).

Ed Bendowski, a resident of St. Mary's Manor, testified that at 8:22 p.m. on the evening of May 14, 1981, he and his wife looked outside the window of a lounge at the manor, which faces Highway 45 Bypass,

and saw a car parked in the southwest corner of the parking lot of Watkins Tower. (IV, 114). After noting that it was unusual to see a car parked in that area after business hours, Bendowski and his wife proceeded to return to their apartment, which is located on the eighth floor of St. Mary's Manor, at 8:23 p.m. or 8:24 p.m. Before entering their apartment, they looked outside the hallway window and saw a tall, black man approach the dumpster located on the ground. This man, identified by Bendowski as being the petitioner, lifted up both of the lids to the dumpster, took a box out of the dumpster, reached under his belt or shirt and then placed something into the box. After the man looked around, he quickly proceeded toward the highway. (IV, 119, 126-27).

Bendowski further testified that at the time he saw the man at the dumpster, it was dusk. However, the area surrounding St. Mary's Manor, from the dumpster to the highway, is well lighted and was so illuminated at the time he saw the petitioner. (IV, 116-17). As Bendowski stood 50 to 55 feet from the ground and the dumpster was 50 to 60 feet from the building, he observed the man at the dumpster at an angle. (IV, 120).

The morning after seeing the man at the dumpster, Bendowski learned that something had happened at the rectory. After hearing this information, he reported what he had seen to the police. The police never made an attempt to ascertain whether he could identify the petitioner or anyone else from photographs. In addition, Bendowski never personally saw the petitioner's photograph in the newspaper or on television; he first realized that the man at the dumpster was the petitioner when he saw the petitioner through the window of the courtroom. (IV, 121-22). According to Bendowski, he held no doubt that the petitioner was the man he saw at the dumpster on the evening of May 14, 1981. (IV, 122).

On cross-examination, Bendowski testified that he watched the man for approximately four or five minutes. During that period of time, he saw the petitioner's face from the side on two or three occasions, some seven to eight seconds each time. When the petitioner walked around the dumpster, Bendowski was able to see the petitioner's face from the front. (IV, 134). Bendowski related that the man at the dumpster was wearing a jacket and a cap which were light colored and which matched. The cap had a bill on it of average length and was blue in color. The man at the dumpster also had on dark pants and dark shoes; Bendowski was unable to see what type of shoes they were. The petitioner, who had long, black hair at the time Bendowski saw him at the dumpster, appeared much the same at trial. (IV, 128A-128B).

Bendowski further stated that at the time he spoke with the CID officer on the morning of May 15, he told the officer that he could identify the man he saw at the dumpster. The officer did not respond to his assertion. (IV, 131-32). Although at no time was he given an opportunity to attempt to identify the man from photographs or a lineup, Bendowski did not call the police after the petitioner's arrest to tell them that he could identify the man at the dumpster. Bendowski did not notify the police because he did not want to become involved; rather, he was waiting for the police to come to him. (IV, 133).

Criminal Investigator George "Butch" Blanton of the Jackson Police Department participated in the investigation of the instant crime. On the morning the priest's body was discovered, Blanton was able to determine that entry to the rectory had been gained by someone breaking out the right panel of the sliding glass doors which lead into the den where the body was

found. (IV, 138-39). From the appearance of the den, a struggle had apparently occurred. In addition, the drawers of a desk which was located in the bedroom area of the rectory had been pulled out and thrown on top of the desk, with their contents in disarray. (IV, 143).

In examining the area outside the rectory, Blanton found a continuous trail of footprints which led from the rectory to the manner and across Highway 45 Bypass to the corner of the parking lot of Watkins Tower where the cardboard box was found. Blanton made plaster casts of some of these shoeprints. (IV, 1460 52). Blanton also prepared a diagram of the den where Father Jackson's body was found. (IV, 153-54).

On cross-examination, Blanton testified that with the exception of the footprint found at the corner of the rectory, the other footprints appeared to have been made by tennis shoes. (IV, 160). Although the police recovered a pair of tennis shoes from the petitioner, Blanton did not attempt to compare the petitioner's shoes with the prints which were found at the scene. In addition, the police were unable to locate the tennis shoes which they believed made the footprints. (V, 164-65).

Blanton further testified that he prepared a narrative summary, which was provided to the defense, of information taken from the notes of the various officers who were involved in the investigation of the instant crime. Specifically, Blanton prepared the portion of the summary which dealt with the notes of Officers Towater and Acuff concerning their interview with Ed Bendowski. (V, 174-175, 189). The officers' notes, which were not signed by Bendowski, do not reflect that Bendowski saw a strange car in the vicinity or that the black

man at the dumpster was wearing a pair of tennis shoes. (V, 194). Likewise, the narrative summary of the interview with Bendowski does not indicate that Bendowski could identify the black man he saw on the night in question. (V, 192).

Sgt. Marvin Spencer of the Jackson Police Department's CID recovered a spent bullet located near the hallway door which leads into the den of the rectory. The bullet had white paint on it which matched the paint of the damaged hallway door and the damaged den wall, and had a splinter on it from the door. (V, 200).

On cross-examination, Spencer testified that the coffee table which was found in the middle of the den appeared to be out of place. The flower pot which was lying on its side with dirt spilled out onto the table was seized for the purpose of examining it for fingerprints; Spencer did not believe that any fingerprints were lifted from the pot. (V, 203-04).

Spencer was present at the time the petitioner was arrested at the Hut Restaurant some two days after the commission of the crime. As Spencer recalled, four other officers were involved in arresting the petitioner, who made no attempt to flee. (V, 207, 209).

Sgt. Gary Randy Winbush of the Jackson Police Department was qualified as an expert in the field of fingerprint analysis. (V, 219). During the course of the investigation, Winbush obtained the petitioner's fingerprints on May 17, 1981. (V, 221). On the morning of May 15, Winbush processed the rectory in an attempt to locate any latent fingerprints which might have been left at the scene. In doing so, Winbush did not find any fingerprints belonging to the petitioner and he was unable to identify some of the fingerprints which were found. (V, 225, 227). However, Winbush discovered

impressions which appeared to have been made by gloved fingers on several pieces of the glass which had been broken out of the sliding glass door and on the sliding glass door itself. (V, 227-28).

In processing the cardboard box which was found in the parking lot of Watkins Tower, Winbush was unable to recover any latent fingerprints of value. He was also not able to determine whether the box had been handled by someone wearing gloves. (V, 228-30). Likewise, no latent fingerprints of value were discovered on the cardboard insert which was found in the box. (V, 230-31).

In processing the area around the rectory, Winbush made impressions of latent shoeprints. (V, 232). The shoeprints which were lifted appeared to match the plaster casts of the shoeprints which were found in the area. (V, 236-37).

On cross-examination, Winbush testified that he was unable to identify the one fingerprint which he lifted from State's Exhibit No. 3, the .38 caliber Smith & Wesson police revolver. In addition, his efforts to process the nickel and the penny which were found in the cardboard box were unsuccessful. (V, 253). In Winbush's opinion, the rectory did not appear to have been wiped clean of fingerprints. (V, 244). To his knowledge, only Sgt. Spencer wore gloves during the time the rectory was processed for evidence. (V, 245-56).

Winbush further testified that he identified the petitioner's fingerprint on a radio which had been seized from the petitioner's motel room. (V, 225, 252). Winbush, who noticed what appeared to be three different tread patterns on the footprints which he had lifted from the carport at the rectory, was never asked to compare the footprints with a pair of shoes. (V, 251).

Mary Timby, a parishioner of St. Mary's Church, testified that Father Jackson ate dinner at her home on the evening of May 14, 1981. Father Jackson arrived sometime between 6:00 p.m. and 6:30 p.m., with dinner being served between 6:30 p.m. and 7:30 p.m. During the course of the evening, the deceased drank one glass of wine and ate lambchops, potatoes, and green beans. (V, 258). The priest left between 8:00 p.m. and 8:10 p.m., with the rectory being a three minute walk from the Timby resident. (V, 258-59).

By stipulation, proof was admitted that Father Jackson was declared dead at the rectory and was the same person who was examined by Doctors Ballard and Harlan. (V, 261).

Charles Warren Harlan, the forensic pathologist who performed the autopsy on Father Jackson on May 15, 1981, testified that death occurred as a result of a near gunshot wound to the back of his right shoulder. (V, 269-70). From the appearances of this wound, the tip of the muzzle of the gun was held three to five inches away from the surface of the skin at the time the gun was fired. (V, 276). The bullet which caused the deceased's death, State's Exhibit No. 26, was recovered from the body. (V, 270, 279-80).

Harlan determined that Father Jackson was shot a second time in the left shoulder by a bullet which exited the body. (V, 270, 277). This wound was caused by a gun fired zero to eight inches from the skin surface. (V, 277). Harlan was unable to determine which of the gunshot wounds was inflicted first or the position of the priest at the time he was shot. (V, 271, 275).

Upon further examination of the body, Harlan discovered a laceration to the right forehead and on

the top of the back of the head. (V, 271-72). In his opinion, some sort of hard object caused these lacerations, and the lacerations were consistent with having been caused by the .38 caliber Smith & Wesson police revolver. (V, 273).

Harlan also located multiple abrasions on the right forearm which he characterized as defensive wounds. Other abrasions were found on both knees. Based upon the lacerations and the bruises on the body, it was Harlan's medical opinion that the wounds had been inflicted upon the deceased during a struggle. (V, 273-74).

As a result of the autopsy, Harlan was able to determine that Father Jackson had consumed for his last meal green beans, baked potatoes, meat, and an alcoholic beverage. (V, 281). With other testimony indicating that the deceased had consumed green beans, potatoes, lambchops and one glass of wine between 6:30 p.m. and 7:30 p.m. on the evening of his death, Harlan determined that the time of death was 8:00 p.m. to 8:30 p.m. on May 14, 1981. (V, 284).

On cross-examination, Harlan stated that the lacerations to the right forehead and the top back of the victim's head could have been caused by a hard object of any type and could have occurred during a fall. However, it was Harlan's opinion that the lacerations were more liekly caused by a gun, considering the shape of the lacerations and the fact that the victim suffered gunshot wounds. (V, 291-92). Harlan also stated that he was not asked to, and did not, take any hair samples from Father Jackson. (V, 289-90).

On re-direct examination, Harlan testified that the blows to the forehead and top of the head could not have been caused by a single fall. (V, 293).

Sgt. Charles Boswell of the Memphis Police Department came to Jackson on May 16, 1981, in an attempt to locate the police revolver which was missing. (V, 298). In an effort to recover the weapon, he came into contact with an Evan Chapman, who identified the petitioner's photograph from a total of six photographs. (V, 299-300). Boswell further testified that he did not know when the photograph of the petitioner was taken. (VI, 301).

Evan Chapman, the owner and manager of Chap's Market and Cafe in Jackson, testified that on the night of May 15, 1981, he returned to the cafe in response to a telephone conversation he had with one of his employees, Charlie Harris. Arriving at the cafe around 10:00 p.m., Chapman spoke with the petitioner, who was wearing blue jeans, a short jacket and tennis shoes, concerning a pistol which the petitioner wanted to sell. The petitioner, who was not asked to, and who did not, give his name, indicated that he had acquired the pistol as a security guard in California and that he wanted to sell the pistol because he needed the money. (VI, 308, 312). The petitioner wanted $60.00 to $70.00 for the gun, which was worth $200.00 to $300.00 or more on the open market. (VI, 308-09). Chapman gave the petitioner $30.00, telling him that he would pay the remainder the following week if the gun as determined to be "clean." (VI, 308-10). In addition to selling Chapman the unloaded gun, the petitioner gave him four rounds of ammunition. (VI, 312-13).

On the morning of May 16, Chapman contacted Captain Cherry of the Jackson Police Department to have the gun checked out. (VI, 310-11). Some time after giving the gun and the ammunition to Cherry, Chapman identified the petitioner from a total of six photographs. (VI, 305, 311).

On cross-examination, Chapman testified that at the time he purchased the gun from the petitioner, his office was lighted by a desk light. (VI, 316). Chapman sat at his desk, with the petitioner seated in a chair positioned at the end of the desk. (VI, 317). During the transaction, they were not interrupted by anyone coming into the office. (VI, 317).

The petitioner, whose dress was not unusual for the type of customers who frequent the cafe, wore his long hair in a new style and needed a shave. (VI, 319-20). The petitioner was also wearing some sort of a little hat. (VI, 319).

Chapman further testified that he made it absolutely clear to the petitioner that he was going to have the gun checked out. The petitioner understood this and did not appear upset at the idea. (VI, 318). Chapman also admitted that although he does not have a license to deal in firearms, he purchased the gun because he thought he could make some money off of it. (VI, 322-23).

Captain James M. Cherry, Jr., a captain with the Jackson Police Department, testified that he obtained the gun and four live rounds of ammunition from Chapman at noon on May 16, 1981. After giving Chapman a receipt, he turned the gun and the ammunition over to Investigator Blanton. (VI, 324-25).

On cross-examination, Cherry stated that he was notified about the gun by way of a telephone call from Refolder Hennings, who made the call for Chapman. (VI, 326).

M. L. "Rocky" Acuff, an investigator with the Jackson Police Department, testified that he and three other officers arrested the petitioner around breakfast time on the morning of May 17 at the Hut

Restaurant, which is approximately a ten-minute walk from the Regency Inn. (VI, 330-31). After having received information that the petitioner was staying at the Regency Inn, Acuff removed a radio from the room occupied by the petitioner. He was unable to determine the ownership of the radio. (VI, 331-32).

On cross-examination, Acuff testified that at the time of the petitioner's arrest, the petitioner was not armed and did not resist or attempt to flee. To the best of Acuff's recollection, none of the arresting officers were in uniform. (VI, 339-40).

Prior to the petitioner's arrest, the police had conducted a surveillance of the Regency Inn. (VI, 341). At the time the motel room which was occupied by the petitioner was searched, a black female was removed; she was not interrogated or interviewed by Acuff. (VI, 342). According to Acuff, the only item taken from the petitioner's room was a radio which was apparently determined not to have been stolen. To the best of Acuff's knowledge, the only fingerprints discovered during the investigation which were the petitioner's were found on this radio. (VI, 343). Acuff further stated that no information was received during the investigation to indicate that the petitioner had a vehicle at his disposal or in his possession. (VI, 341).

Acuff further testified that he and Sgt. Towater spoke with Ed Bendowski on the day the priest's body was found. In describing the man he saw at the dumpster on the preceeding evening, Bendowski described a black male, approximately 5' 10" to 6' tall, wearing a blue windbreaker and dark trousers. Aruff did not recall Bendowski (who had earlier spoken with Sgt. Towater in the absence of the witness) indicate that he could identify the man he saw at the dumpster. Likewise,

Acuff did not recall that Bendowski said anything about a pair of white tennis shoes. (VI, 346-50). According to Acuff, the notes he made of the interview with Bendowski constitute a true and accurate statement of the information provided by Bendowski. (VI, 352).

Acuff also testified that he was familiar with the residential makeup of the area surrounding St. Mary's Manor. Some one to two thousand yards from the manor is an area of low income housing in which several black families live. (VI, 357-58). Apparently, there is an access road which leads from the manor to this housing area. (VI, 358-59).

Lieutenant Barney Wright of the Memphis Police Department conducted a tentative comparison of the bullet which was found at the rectory, the bullet which was recovered from Father Jackson's body, and a test fire bullet. (VI, 360-63). As a result of this examination, Wright determined that the bullets, which were for a gun of the same make and model, could have possibly been fired from the same weapon. (VI, 364, 367-68).

Thomas K. Ballard, the Madison County Medical Examiner, testified that he arrived at St. Mary's Rectory at 8:55 a.m. on the morning of May 15, 1981. (VI, 372). Ballard, who was personally acquainted with Father Jackson, pronounced the priest dead at the scene (VI, 372).

Upon examining the body at the hospital, Ballard determined that the cause of death was a gunshot wound to the right upper back which penetrated Father Jackson's back, esophagus, and heart. He also observed a second gunshot wound to the left back. (VI, 373-74). Ballard characterized both of these gunshot wounds as "near" wounds. (VI, 377).

In addition to the gunshot wounds, Ballard discovered a laceration to the right scalp which could

have been caused by a fall or by the deceased having been struck with a blunt object, such as the police revolver. (VI, 374-75). Another laceration was located on the top of the victim's head, which could also have been a result of a fall or a blow. (VI, 379). However, given the location of these lacerations, it would be difficult for Ballard to conclude that the lacerations were caused by a single fall. (VI, 379-80).

Fresh abrasions were found on the deceased's left upper arm, below the left elbow, the left wrist, the right lower leg, above the right heel and above the left heel. (VI, 378-80). An examination of the deceased's tongue indicated that Father Jackson had completely bitten through the distal end of his tongue during the death process or during a struggle. (VI, 377-78).

Ballard further testified that his medical findings and the appearance of the den in which the deceased was found indicated that a struggle had occurred. (VI, 381). According to Ballard, the abrasions and contusions on the deceased's arms and the lacerations on the deceased's head could be characterized as defensive wounds. (VI, 382). Ballard also stated that Father Jackson was 5' 6" tall and weight approximately 155 pounds. (VI, 384).

Sgt. R. L. Towater, an investigator with the Jackson Police Department, reported to St. Mary's Manor on the morning of May 15, 1981, for the purpose of canvassing the area for evidence and witnesses. As a result of speaking with Ed Bendowski, he went to the eighth floor of the manor and looked out the hallway window; below, he could clearly see the dumpster. (VI, 388-89).

Towater observed shoeprints around the dumpster which indicated that someone had been there recently.

The shoeprints traveled in the direction from the rear of the manor walking south to north, then made an entire circle around the dumpster, and headed in an easterly direction toward Highway 45 Bypass. (VI, 390).

Towater identified the lining of a cardboard box which was found at the southeast corner of the dumpster between the dumpster and the manor. (VI, 387). According to information received from Bendowski, it was this lining which had been discarded by the black male he had observed at the dumpster the previous evening. (VI, 386).

On cross-examination, Towater testified that the hallway window on the eighth floor has a light tint to it. Although the tint did not hamper his ability to see out of the window during the daytime, Towater did not ascertain what effect the tint would have at night. (VI, 391-93).

During Towater's conversation with Bendowski, Bendowski stated that the suspect at the dumpster wore dark colored shoes; Bendowski did not relate that the suspect were tennis shoes. Bendowski also stated that the suspect wore a light blue jacket and a light colored hat, with a snap bill, that matched the jacket. (VI, 397). Although Towater did not recall Bendowski indicating that he was able to identify the man at the dumpster, Towater was unable to state that Bendowski did not, in fact, tell him this. (VI, 394-95).

Patrick Garland, a Senior Firearm Examiner with the TBI Crime Laboratory, compared the bullet which was found at the rectory, the bullet which was recovered from Father Jackson's body, four test fire bullets, and the police revolver. As a result of this comparison, Garland determined that the bullet which was found at the scene of the crime and the bullet which was recovered

from Father Jackson's body had been fired from the police revolver. (VI, 419-20).

On cross-examination, Garland stated that to the best of his knowledge, he has never made a mistake in matching a test bullet to a suspect bullet in determining whether the bullets were fired from the same weapon. (VI, 422-23). In Garland's opinion, the field of firearms examination is as exact a science as mathematics. (VI, 426). Garland also stated that the damage to the bullet found at the scene and the bullet taken from the body did not affect his ability to determine that the bullets had been fired from the police revolver. (VI, 432).

On re-direct examination, Garland testified that the bullet which was recovered from the rectory was examined by Serologist Beganney in his presence; the results of the serology test were negative. (VI, 434).

Sgt. Harrell C. Carter of the Jackson Police Department obtained all of the clothing that Father Jackson wore at the time of his death. This clothing included the victim's shirt, trousers, and shoes. (VI, 437-39).

Captain Robert Daley, the officer in charge of the Jackson Police Department's CID, was present at the Calvary Cemetary in Memphis, Tennessee, on November 16, 1981, at which time Father Jackson's body was exhumed. (VI, 444). Acting pursuant to an order of the court, he removed hair from five places on the victim's head, placing the hairs in individual envelopes. The hair was removed from the right center, top center, back, right side, and left side of the victim's head. (VI, 444, 446).

By stipulation, it was admitted that the body which was exhumed was that of the victim and that the

hair samples which were recovered had been taken from the victim. (VI, 445).

On cross-examination, Daley testified that Father Jackson was buried around May 16, 1981, with the grave being opened the following November 16. (VI, 447). The length of time which transpired between the crime and the exhumation of the body was occasioned by the fact that although there had been a comparison of hair found on the victim's clothing and on the petitioner's clothing, it was necessary to establish that the hair found on the victim's clothing actually came from the victim. (VI, 448). Immediately upon receiving information from the FBI concerning the initial hair analysis, steps were initiated to obtain a court order to permit the exhumation of Father Jackson's body. After obtaining the hair samples from the body, the FBI was able to undertake a second hair analysis within a couple of days. (VI, 448).

Sister Mary Ann Guthrie, an administrative assistant to the Catholic Diocese of Memphis, was personally acquainted with Father Jackson. She saw the victim in death on May 15, was present at the time the victim was entombed at the Calvary Cemetary, and was present at the time the body was exhumed. Sister Guthrie further testified that she personally observed Captain Daley remove certain hair samples from the exhumed body which was, in fact, Father Jackson's body. (VI, 451-52).

Lieutenant Richard Higgins of the Jackson Police Department was in charge of the instant investigation. Arriving at St. Mary's Rectory at 8:30 a.m. on the morning of May 15, 1981, he examined the scene and noticed a coin on the floor of the hallway leading from the rear of the rectory into the den where Father Jackson's body was discovered. Higgins noticed another

coin on the floor of the den next to the door leading into the hallway. (VII, 458).

On the day of the petitioner's arrest, he obtained a blue denim windbreaker jacket and a pair of denim Levis from the petitioner. The petitioner's clothing and the victim's clothing were sent to the FBI Crime Laboratory for analysis. (VII, 461-65).

On cross-examination, Higgins testified that the petitioner was wearing a pair of tennis shoes at the time of his arrest. Higgins made no effort to compare the petitioner's tennis shoes with the shoeprints which were found at and around the scene of the crime because it was obvious that the tread of the petitioner's shoes and the shoeprints did not match. (VII, 469-70).

Higgins further testified that three of the four officers who arrested the petitioner were Caucasian. Following the petitioner's arrest, the petitioner came into contact with several Caucasian persons during the course of being fingerprinted and photographed. However, the only Caucasian hair samples which were sent to the FBI Crime Laboratory were those recovered from Father Jackson's body. (VII, 479-82).

Higgins stated that to his knowledge, no clothing was removed from the petitioner's room at the Regency Inn at the time it was searched. (VII, 484). He also stated that other than Sgt. Spencer, no other officer at the crime scene wore gloves during the investigation. (VII, 472-73). In addition, the investigation into the murder of Father Jackson did not uncover what might have been stolen from the rectory which would have required a large box to remove it from the scene. (VII, 489). According to Higgins, it appeared that the cardboard lining which was found near the dumpster belonged to the cardboard box which was found in the parking lot

of Watkins Tower. With the lining removed from the box, the box was capable of holding a greater amount of matter. (VII, 489-90).

Higgins also testified that the area around Preston Street and the Carousel Lounge is generally known to be a black area of Jackson. A lot of blacks also live in the low-income housing located to the west of St. Mary's Rectory. (VII, 488-89).

On re-direct examination, Higgins testified that he inserted the cardboard lining into the cardboard box and it fit. (VII, 492).

Following a jury-out hearing, Special Agent Mike P. Malone of the FBI was declared to be an expert witness in hair and fiber analysis. (VII, 503-16). After detailing his professional qualifications before the jury, Malone described the process which is used to examine hair and explained that it is possible to determine through analysis whether the hair is animal or human; whether it is Negroid, Caucasion, Mongoloid, or a mixed race; whether it was removed forcibly, shed naturally, or cut with scissors; whether it was subject to artificial treatment, such as bleaching, dying, or a permanent; whether it is diseased; and what area of the body it came from. (VII, 534-35). In normal hair, it is possible to find approximately 20 individual characteristics, but at least 15 individual characteristics must be found in order to use the hair for comparison. (VII, 537-38). However, Malone stressed that hair analysis does not provide positive personal identification, such as fingerprint analysis, because hair is not unique enough to determine that it came from one person to the exclusion of all others. (VII, 538).

During Malone's seven years of experience, he has performed approximately 10,000 individual hair

examinations. Over that period of time, Malone encountered only two occasions where the head hairs from two different people were so similar as to preclude an identification. (VII, 555). As a result of his experience, Malone stated that it is highly unlikely that the hair from any two persons will exhibit exactly the same characteristics. (VII, 539). However, if the hair from two individuals matches, both individuals must have been in the same place where the hair was found. (VII, 539-40).

Prior to receiving a known sample of the victim's hair, Malone compared several brown Caucasian head hairs which were found on the victim's shirt with one brown Caucasion head hair which was found on the petitioner's windbreaker. This examination revealed that the hairs exhibited exactly the same individual microscopic characteristics. In Malone's opinion, the hairs were indistinguishable and probably originated from a common source. (VII, 529-31).

After receiving the known hair sample from Father Jackson's head, Malone compared the hair removed from the victim's shirt and the hair found on the petitioner's jacket. Malone stated that the hairs were indistinguishable, having the same 20 individual microscopic characteristics. In Malone's opinion, these hairs could definitely have come from the same individual. (VII, 540-42). Malone also stated that if another person exists who has hair exactly like Father Jackson's, that person would have to have been in a position where his/her hair could have been deposited on both the victim's shirt and the petitioner's jacket. (VII, 542).

Malone further testified that the hair which was found in Father Jackson's shirt had been removed from his head as a result of the normal shedding process. The hair which was recovered from the petitioner's jacket

had been forcibly removed from the individual to whom it belonged. The forcible removal of this hair was consistent with an injury caused by a blunt instrument to the head of this individual. (VII, 554).

Malone also stated that if the petitioner's jacket had come into contact with other Caucasian persons, such as those persons brushing up against the petitioner, the hair which might be deposited on the petitioner's jacket would normally be hair which had been shed as a result of the normal growth cycle. (VII, 546). According to Malone, it is much more unlikely to find hair which has been forcibly removed than to find hair which has come out naturally. (VII, 545).

On cross-examination, Malone testified that the hair which was found on the victim's shirt was definitely head hair. This hair was two and one-half inches in length; whereas, the hair which was found on the petitioner's jacket was two and one-quarter inches in length. (VII, 548-49). During his examination of Father Jackson's clothing, he did not find any Negroid hairs. (VII, 554).

Malone also stated that the field of hair analysis definitely constitutes an exact science. (VII, 553). Due to the necessity of having to return hair samples to the contributor, Malone had not effected a cross-match of the 10,000 hair samples which he has examined during the past seven years. (VII, 552).

Malone repeated that hair analysis does not constitute a positive personal method of identification, although it is highly unlikely that the hair from two individuals will exhibit the same characteristics. (VII, 551). Malone admitted that if he finds two hair samples which match perfectly, he cannot positively determine that the samples originated from a common source. (VII, 554).

Roderick Elmore, an inmate of the Memphis County Jail awaiting trial on a charge of armed robbery, came into contact with the petitioner when they were both incarcerated in June of 1981. (VII, 557-58). At that time, Elmore overheard portions of a conversation which occurred between the petitioner and an unnamed individual. During the course of this conversation, the petitioner stated that he had gone through Jackson and that he had gotten to Jackson by way of his girlfriend. The petitioner also stated that he was on the grounds of the rectory and that he had sold a pistol to someone in Jackson. (VII, 559-61). Elmore, who could not hear the entire conversation, did not hear the petitioner say what time he was at the rectory; whether anything happened to him at the rectory; whether he came into contact with anyone at the rectory; or whether he obtained anything of value while he was at the rectory. (VII, 560-61).

On cross-examination, Elmore testified that he had previously been arrested on a charge of first degree burglary. He did not make any deals with the prosecution in Memphis or in Jackson in exchange for his testimony at the instant trial. (VII, 562, 566).

Elmore also identified a written, signed statement which he made to officers of the Memphis Police Department concerning his knowledge of the instant case. (VII, 566-68). According to Elmore, although he could not see the petitioner at the time the conversation ocurred, he was positive that it was the petitioner's voice which he heard. (VII, 563-64).

Lieutenant Bobby Holt, an investigator with the Jackson Police Department, participated in the arrest of the petitioner at approximately 8:00 a.m. on May 17, 1981, at the Hut Restaurant. (VII, 570-71). The petitioner was taken into custody without incident. (VII, 573).

After having been advised of his constitutional rights, the petitioner executed a written waiver of his constitutional rights and gave an oral statement which was recorded. The petitioner's oral statement was reduced to typewritten form and a redacted version of the statement was read into the record. In his statement, the petitioner stated that he came to Jackson from Memphis with a man named T-Bone and T-Bone's friends some time after 11:00 p.m. on May 12, 1981. They drove to the Regency Inn, where T-Bone registered for him under the name of "Louise." The petitioner himself did not register because he was without identification. The petitioner, who gave T-Bone around $59.00 to pay for the rent on the room for one week, checked into Room 20 something. After the petitioner checked into his room, the other individuals returned to Memphis and the petitioner went to sleep. (VII, 580-86).

The following morning, a Wednesday, the petitioner called a friend of his named Robert and Robert's sister, Jenny, to come and pick him up at the motel because he did not know his way around Jackson. The petitioner then played basketball behind someone's house which was located a few blocks from Jenny's house. After playing basketball, he returned to the motel around 8:00 p.m. and stayed there alone all night, watching television and listening to the radio. (VII, 588-89).

On Thursday morning, the petitioner took a cab to Jenny's house on Preston Street because he was unable to contact anyone to give him a ride. After drinking for a while, he played basketball with some

p.m. or 10:00 p.m., took a cab to his motel. The petitioner did not know what time he arrived at his motel, but it was late and he was drunk. The petitioner then went to sleep and stayed in his room until the next morning around 6:00 a.m. or 7:00 a.m. (VII, 589-93).

On Friday morning, the petitioner took a cab and went to Jenny's house. As he was returned to his motel by cab, he passed a club and stopped. At the club, he met a young lady around 9:00 p.m., 10:00 p.m., or 11:00 p.m. The petitioner left the club around midnight, returning to the motel after getting a ride with a John or Johnson who drove a white and lavender Monte Carlo or Grand Prix. According to the petitioner, "we" watched television for a while and he then went to sleep. (VII, 593-96).

The petitioner awoke around 8:00 a.m. or 9:30 a.m. on Saturday morning. After helping the maid clean his room, he went across the street and ate at the Kentucky Fried Chicken. He then returned to the motel. When the maid got off work around 3:00 p.m., he went to her house and stayed the night. He returned to the motel with the maid on Sunday morning, as she had to go to work. (VII, 596-98).

In his statement, the petitioner denied that he had any knowledge of the instant crime. The petitioner stated that he did not know the location of the rectory and has never had in his possession a police revolver. (VII, 601-02). The petitioner also stated that the

The petitioner stated that he purchased the tennis shoes which he was wearing at the time of his arrest at some store in downtown Memphis on May 11. (VII, 600, 602). According to the petitioner, the hat which he was wearing when he was arrested belonged to his friend, Robert. The petitioner stated that he himself owned a blue jean hat. (VII, 600). Finally, the petitioner stated that the money which he used during this period came from the sale of some of his clothes and constituted money he already had. (VII, 599).

On cross-examination, Holt stated that the petitoner made this statement prior to being processed or fingerprinted. The petitioner's clothes were taken from him prior to the statement, and the petitioner was given other clothes to put on. (VIII, 605). Also prior to giving his statement, the petitioner made a telephone call. (VIII, 606).

B. The Petitioner's Proof

Howard Anthony Williams testified that he met the petitioner, whose nickname was "Chinaman," at the Preston Street home of his girlfriend, Jenny Pirtle. (VIII, 613). Williams stated that it was around 4:00 p.m. when he met the petitioner, and he believed that it was on the Thursday prior to the time Father Jackson was murdered. (VIII, 614-15).

Between 6:00 p.m. and 6:30 p.m., Williams and the petitioner walked to the Carousel Club, which was closed at that time. For about ten minutes, they sat in Pop-Eye's Restaurant next door until the club

(VIII, 615, 639-36). The petitioner and Williams

With the exception of [illegible] minutes when

Williams [illegible] Chat's Place. (VIII,

620-21).

After leaving the Carousel Club around 8:00 p.m., they took a cab to Chat's Place, arriving shortly after 8:30 p.m. The petitioner and Williams remained at Chat's Place, drinking and playing pool, until 10:30 p.m. At that time, Williams and Jenny (who had joined them) left and went to her house. (VIII, 625-26). Around midnight, the petitioner arrived at Jenny's house and attempted to contact a young lady by telephone. (VIII, 627-28). The petitioner remained with Williams and Jenny for approximately one hour, after which Williams did not see the petitioner again. (VIII, 629).

According to Williams, the petitioner's physical appearance on the night in question did not appear unusual. (VIII, 628-29). Williams also stated that the petitioner was not a personal friend, but was simply someone he met one day. (VIII, 631).

On cross-examination, Williams stated that he did not know a Madley Graves and did not have a conversation with him on Thursday. Williams then stated that he did know Madley, but did not see him at any time on the day in question. (VIII, 631-32). First stating that he could not recall if Madley was at Chat's Place, Williams then stated that Madley was there. (VIII, 640-41). Upon being questioned as to whether anyone asked him after he got to Chat's Place how he had gotten there, Williams initially stated that Madley did. Williams then stated that it was not Madley who asked him the question, but rather was Jenny. Williams then admitted that he and Madley engaged in a conversation regarding

Williams denied that his nickname was Hambone. Williams also stated that he had no idea why the petitioner in his statement initially said that he had stayed at Jenny's house after playing basketball until 7:00 p.m. and then changed his statement to say that he and a Hambone went to a chicken place on Thursday afternoon around 4:00 p.m. According to Williams, he did not know why the petitioner did not say that he was with him. (VIII, 645-46). Williams also did not know why the petitioner stated that after he finished playing basketball with Hambone, he remained at Jenny's house until 10:00 p.m., instead of telling the police that he was with Williams. (VIII, 647).

Charlie Lee Harris, who was employed at Chat's Place at the time of the crime, testified that he saw the petitioner in Chat's Place between 8:00 p.m. and 9:00 p.m. on Thursday night. He remembered the petitioner because an altercation arose between the petitioner and the late Michael Love over a pool game. Apparently, Love was interferring with the petitioner's game and was kicked out of the club as a result. (VIII, 654).

Harris further testified that he saw the petitioner in Chat's Place on Friday night. At that time, the petitioner was talking to Mr. Chapman. (VIII, 655).

On cross-examination, Harris stated tht he was not positive of the exact time that he saw the petitioner on Thursday night. According to Harris, it could have been later than 9:00 p.m. (VIII, 657).

During the conversation concerning the gun, the petitioner did not introduce himself by name to Harris. (VIII, 659). The first time that Harris saw the gun, it was in the possession of the petitioner. After Harris examined the gun, he gave it back to the petitioner. (VIII, 659-61).

When Chapman arrived at his place of business, Harris directed the defendant to him. After the petitioner told Chapman that he wanted $60.00 for the gun, Chapman and the petitioner immediately went into Chapman's office. The petitioner remained in the office for a short period of time; Harris did not question Chapman concerning what had occurred in the office. However, Chapman showed him the gun which was the same gun the petitioner had in his possession. According to Chapman, State's Exhibit No. 3, the .38 caliber Smith & Wesson police revolver, looks exactly like the gun in question. (VIII, 663).

On re-direct examination, Harris testified that the petitioner stayed at the club for a record party after he had met with Chapman. The petitioner, who paid the club's cover charge, also paid the cover charge for several other persons. (VIII, 664). During the record party, the petitioner did not appear to be nervous, but was dancing and having fun like the other patrons. (VIII, 664).

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Although he did not talk to the petitioner, Cannon spoke with Madley outside the club. As a result of their conversation, Cannon got Madley's car and drove the petitioner to his motel around midnight. (VIIII, 669-70). At the motel, Cannon waited a few minutes outside in the car while the petitioner changed his clothing. They then drove to the Pirtle residence and stayed outside in the car, talking. (VIII, 671-72). Within 10 minutes after having left the Cafe, the petitioner and Cannon drove to Cannon's house on Hunt Street where they parked in front of the house. (VIII, 673-74). The petitioner wanted to party, but Cannon told him that there was no gas in the car and that there was nowhere to go. Thereupon, Cannon went into his house and the petitioner walked away in the direction toward the Pirtle residence. (VIII, 674-75).

Cannon testified that he next saw the petitioner late Friday evening. He had no further contact with the petitioner, who was not a friend of his. (VIII, 675-76).

On cross-examination, Cannon admitted that he had no idea where the petitioner was prior to the time that he saw the petitioner around midnight on Thursday. Cannon also stated that when he drove the petitioner to his motel room, the petitioner came out of the room with a bundle of what appeared to be clothing. (VIII, 677).

convicted of second degree murder in the Criminal Court of Davidson County on January 4, 1979, receiving a sentence of ten years, and that the petitioner was convicted of first degree murder in the Circuit Court of Shelby County on November 6, 1981, receiving a sentence of death. (IX, 706).

B. The Petitioner's Proof

The petitioner presented no proof.

the direct appeal to the Supreme Court of Tennessee, the petitioner preserved his complaint concerning the denial of the motion by the trial court.

At trial, the petitioner failed to contemporaneously object to the admission of the prior judgment of conviction finding the petitioner guilty of first degree murder, and the petitioner failed to contemporaneously object to the district attorney general's closing argument. In addition to the judgment of conviction being admitted without objection on the part of the petitioner, the petitioner did not move to redact the judgment to omit its reference to the prior death sentence. Rather, the judgment of conviction was admitted by agreement of the petitioner and the respondent. (IX, 798).

In his motion for a new trial, the petitioner failed to preserve all but one of his complaints concerning the sentencing phase of the trial. This complaint was predicated upon the allegation that the district attorney general improperly commented upon the fact that the petitioner "had been given the electric chair as the result of his conviction on a murder charge in Memphis, Tennessee." (I, 29). On direct appeal to the Supreme Court of Tennessee, the petitioner raised the same complaints he presents here concerning the sentencing phase of the trial.

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guilty of first degree murder and first degree burglary, and fixing the petitioner's punishment at death on the first degree murder conviction and not less than ten (10) years, nor more than fifteen (15) years incarceration on the first degree burglary conviction.

The Supreme Court of Tennessee did not decide a federal question of substance not heretofore determined by this Court or decide such a question in a way not in accord with the applicable decisions of this Court, another state court of last resort, or a federal court of appeals. See Supreme Court Rule 19(1)(a). There being no special and important reasons for a grant of certiorari in this case, the Court in its sound judicial discretion should deny the writ sought here.

I. THE SUPREME COURT OF TENNESSEE FULLY CONSIDERED AND CORRECTLY REJECTED THE PETITIONER'S CONTENTION THAT THE TRIAL COURT ERRED IN DENYING HIS MOTION FOR FUNDS TO SECURE THE ASSISTANCE OF AN EXPERT IN THE FIELD OF HAIR ANALYSIS.

The petitioner contends that his Sixth Amendment right to the effective assistance of counsel was abridged by the action of the trial court in denying his motion for funds to secure the assistance of an expert in the field of hair analysis. The respondent respectfully submits that the petitioner's right to the effective assistance of counsel was not violated by the trial court's ruling and that, absent some statutory authorization under state law, the trial court properly determined

> Essentially this is a matter that addresses itself to the judgment and discretion of the legislature. Thus far it has not seen fit to provide such services to indigent defendants.

Id. at 536. See also Collins v. State, 507 S.W.2d 179 (Tenn. Crim. App. 1973).

In the instant case, the Supreme Court of Tennessee, in reliance upon Baldi and Graham, found the petitioner's contention to be without merit under both federal and state law:

> The Defendant contends his Sixth Amendment right to effective assistance of counsel was abridged by the trial court's denying his motion for funds to secure the assistance of an expert in the field of hair analysis. The United States Supreme Court, in United States ex rel. Smith v. Baldi, 344 U.S. 561, 73 S. Ct. 391, 97 L.Ed. 549 (1953), held that a state is under no federal constitutional obligation to provide expert pre-trial assistance to an indigent defendant. The defendant, in Baldi, requested that the trial court

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[2]The petitioner presented a motion for funds to secure the assistance of an expert witness some five (5) days prior to the date set for trial. In denying the petitioner's motion, the trial judge declined to continue the case for an indefinite period, where the petitioner had not obtained an independent hair analysis expert and did not even know if such an expert existed. (III, 12-13). However, the trial court granted leave to the petitioner to renew his motion should the petitioner have obtained an expert within a period of time so as to not delay the trial. (III, 13). The record does not indicate that the petitioner ever renewed his motion.

> 547 S.W.2d 531 (Tenn. 1977). The Defendant points to, and our research turns up, no statute which would grant an indigent criminal defendant a right to this assistance. Although the Defendant "urge[s] this Court to adopt a rule of law allowing an indigent defendant funds for expert assistance," we decline to do so. "Essentially this is a matter that addresses itself to the judgment and discretion of the legislature. Thus far it has not seen fit to provide such services to indigent defendants." Graham, 547 S.W.2d at 536.

State v. Williams, 657 S.W.2d 405, 411 (Tenn. 1983).

The respondent asserts that the Supreme Court of Tennessee reached the correct conclusion both under prevailing case law and under the facts of the case. Not only was the petitioner not entitled to the services of an independent expert, but the petitioner has failed to demonstrate any prejudice resulting from the denial of funds with which to obtain an independent hair analysis expert, other than to imply a lack of knowledgeable ability to impeach the state's expert, FBI Agent Mike Malone. However, the record reveals that the petitioner extensively and effectively cross-examined Agent Malone at trial. Moreover, the petitioner has not established what benefit he might have received from another expert's findings, for he does not claim that Agent Malone was unqualified as an expert, improperly conducted the hair analysis, or erred in his findings.[3]

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[3]The record reveals that sometime prior to the trial court ordering the exhumation of Father Jackson's body, Agent Malone had compared brown Caucasian head hair found on the priest's shirt with brown Caucasian head hair found on the petitioner's jacket, and determined that the hairs were indistinguishable. The petitioner apparently does not claim that he was not timely notified of the results of this test, but only complains as to the two-week notice he received prior to trial of the analysis performed on the known hair sample from Father Jackson and the hair recovered from the petitioner's jacket.

With testimony from Agent Malone establishing that he could be reasonably expected to [illegible], (Vol. 5:3), with testing and certification [illegible] have reached a different conclusion, and with the defense having conducted an exemplary cross-examination of Agent Malone, the respondent insists that the trial court acted well within its discretion in refusing to grant the petitioner's motion for funds, particularly where the granting of the motion would have delayed the trial and particularly where the basis for the motion rested purely upon speculation. For these reasons, the petitioner is not entitled to a granting of his petition for a writ of certiorari.

The petitioner contends that the trial court erred in improperly monitoring the admission of evidence and the arguments of counsel at the punishment phase of the trial. According to the petitioner, the trial court erred in permitting the state to introduce into evidence that portion of a certified copy of a judgment of conviction which recited the sentence the petitioner received upon a prior conviction for first degree murder. The petitioner also contends that the district attorney general improperly commented upon the judgment of conviction and improperly referred to matters not in evidence during his closing argument. The respondent respectfully submits that the Supreme Court of Tennessee correctly found that no reversible error was committed at the sentencing hearing.

As indicated previously, the record reveals that the petitioner wholly failed to contemporaneously object to either the admission of the judgment of conviction or to the district attorney general's closing argument. In addition, the record shows that the judgment of conviction was not only admitted without objection on the part of the petitioner and without any defense motion to redact the judgment, but was actually admitted by agreement of the parties. (IX, 798).

In addition to failing to apprise the trial court of the instant complaints at the sentencing hearing, the petitioner failed to bring all but one of his complaints to the attention of the trial court in his motion for

In any event, despite the petitioner's failure to properly preserve his complaints in the trial court, the respondent asserts that the Supreme Court of Tennessee correctly determined that no reversable error was committed at the sentencing hearing. One of the aggravating circumstances relied upon by the state to establish that the petitioner merited capital punishment was that the petitioner had been previously convicted of one or more felonies which involved the use or threat of violence to the person. Tenn. Code Ann. § 39-2-203(i)(2). In order to show beyond a reasonable doubt the existence of this aggravating circumstance, the state was obviously required to prove that the petitioner had, in fact, been convicted. Under Rule 32(d) of the Tenn. R. Crim. P., a judgment of conviction must set forth "the plea, the verdict or findings, and the adjudication and sentence." (Emphasis supplied). Since a conviction of crime necessarily includes the imposition of a sentence, it was incumbent upon the state to establish as an element of the aggravating circumstance in question that the verdict of guilt previously rendered against the petitioner ac ually included the assessment of punishment.

The respondent further insists that the district attorney general, during closing argument, properly commented upon the sentence previously received by the petitioner.[4] Since the judgment of conviction was properly

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[4]Although the petitioner asserts that the record does not reflect that the judgment of conviction was passed to the jury, the judgment was clearly admitted into evidence and was thus subject to comment by counsel. (IX, 798).

The respondent additionally asserts that the district attorney general properly argued that the petitioner had been convicted of killing a police officer in the line of duty. (IX, 808-09). The judgment of conviction finding the petitioner guilty of first degree murder in the Circuit Court of Shelby County on November 6, 1981, recites the aggravating circumstances found by the jury in imposing the sentence of death: (1) the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another; (2) the murder was committed by the defendant while he was in lawful custody or in a place of lawful confinement or during his escape from lawful custody or from a place of lawful confinement; and (3) the murder was committed against any peace officer, corrections official, corrections employee or fireman, who was engaged in the performance of his duties, and the defendant knew or reasonably should have known that such victim was a peace officer, corrections official, corrections employee or fireman, engaged in the performance of his duties. (Exhibit No. 2; IX, 868).

Quite clearly, the aggravating circumstances set forth above established that the petitioner murdered a police officer who was engaged in the performance of his official duties. The district attorney general's argument, being predicated on proof adduced at trial, was thus proper. State v. Sutton, supra; Russell v. State, supra.

> The first objection made about the impropriety of the State's arguments is made before this Court. Here, the Defendant objects to the state's mentioning the prior death sentence and to Mr. Woodall's phrase "blew his brains out." As there is no evidence in the record about the details of the killing of officer Cox, Mr. Woodall's comment was improper. See Russell v. State, 532 S.W. 2d 268 (Tenn. 1976). This error does not require a reversal of the Defendant's sentence, however, as he has shown no resulting prejudice. In a consideration of whether improper conduct on the part of the State requires reversal, a court may look to several factors, such as the effect of curative measures taken by the trial court, the intent of the prosecution, the cumulative effect of the improper conduct and any other errors in the case, and the relative strength of the case. See Judge v. State, 539 S.W.2d 340 (Tenn. Crim. App. 1976). Our review of the State's arguments convinces us that counsel were otherwise careful in their choice of words, considering the facts of this case are lamentable. The comment was isolated and Mr. Woodall's argument and Mr. Hymer's argument were in all other respects temperate.

State v. Williams, supra, 657 S.W.2d at 413.

Based upon the preceding argument, the respondent submits that it is clear that the petitioner waived any right to complain on appeal of the action of the trial court in monitoring the admission of evidence and the arguments of counsel at the punishment phase of the trial. In any event, the petitioner's complaints are without merit and could not possibly have resulted in reversible error. Accordingly, this Court should

deny the petitioner's petition for the writ of certiorari.

Respectfully submitted,

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AFFIDAVIT OF CERTIFICATE OF SERVICE

I, ROBERT A. GRIDLOW, being first duly sworn, make oath that I am a member of the Bar of the Supreme Court of the United States. I have previously entered by appearance as counsel of record in behalf of the respondent in this cause, the State of Tennessee.

I further certify that on this 27th day of January, 1984, I deposited ten (10) copies of the instant Brief in Opposition to Petition for Writ of Certiorari in a United States mailbox, with first-class postage prepaid, properly addressed to the Clerk of this Court and within the time allowed for filing; that I deposited one (1) copy of the instant Brief in Opposition to Petition for Writ of Certiorari in a United States mailbox, with first-class postage prepaid, properly addressed to the Honorable Lionel R. Barrett, Jr., P.C., Fifth Floor, 207 Third Avenue North Building, Nashville, Tennessee 37201, and within the time allowed for service.

I further certify that all parties required to be served have been served.

ROBERT A. GRIDLOW
Deputy Attorney General

Sworn and subscribed before me this 30th day of January, 1984.

NOTARY PUBLIC

My Commission Expires:

July 18, 1987